LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 810

FRANCIS A. SIMPSON, JR., JAMES T. SKEENS, JOHN C. RENNER, and FEDORA A. FLANAGAN, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD L. CAREY
WALTER E. GILLCRIST
Counsel for Petitioners
821 Fifteenth Street, N. W.
Washington, D. C., 20005

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Citations to Opnions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision and States Involved	3
Statement	3
Reasons for Granting the Writ	6
Conclusion	10
Appendix:	
Constitutional Provision and Statutes Involved	1a
Judgment Below	3a

CITATIONS

CASES:

Aguilar v. Texas, 378 U.S. 108 (1964)	7
Beck v. Ohio, 379 U.S. 89 (1964)	7
Brinegar v. United States, 338 U.S. 160	7
Grunewald v. United States, 353 U.S. 391 (1957)	8, 9
Jones v. United States, 362 U.S. 257 (1960)	7, 8
United States v. Ventresca, 380 U.S. 102 (1965)	7, 8

CONSTITUTIONAL PROVISIONS:

The Fourth Amendment to the Constitution of the United States	3, 4
The Fifth Amendment to the Constitution of the United States	2, 6, 8, 9

STATUTES:

18 U.S.C. Sec. 371	4
18 U.S.C. Sec. 1952	4
22 D.C. Code (1961 ed.) Sec. 1501	4
22 D.C. Code (1961 ed.) Sec. 1502	3, 4
22 D.C. Code (1961 ed.) Sec. 1505	4

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 4 (a)	3
Rule 41 (c) and (e)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

FRANCIS A. SIMPSON, JR., JAMES T. SKEENS, JOHN C. RENNER, and FEDORA A. FLANAGAN, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Francis A. Simpson, Jr., James T. Skeens, John C. Renner, and Fedora A. Flanagan, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on September 21, 1965.

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit did not write any opinion in this cause.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 21, 1965, R. 51; p. 3a, infra. Rehearing was denied on November 9, 1965. R. 61. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Did an affidavit, which was the sole predicate for a search warrant for a private residence and arrest warrants demonstrate probable cause where, other than observations of completely innocent activity, the affidavit only contained conclusionary information by confidential informants without any underlying circumstances being stated and also contained petitioners' criminal arrest and conviction records.

2. Is an affidavit, which is the sole basis for the issuance of a search and arrest warrants legally sufficient which contains a recital of the criminal arrest and conviction record of those for whom application for arrest warrants were made.

3. Did the Government prosecutor commit reversible error in suggesting to the jury in his closing argument that persons named on a Government exhibit seized in the execution of a search warrant were not brought in as witnesses because they would have refused to talk or taken the Fifth Amendment, where the record was devoid of any such evidence and was the error compounded by the Court's failure to instruct the jury to ignore the remarks.

Petitioners were charged in a six-count indictment with Federal and District of Columbia gambling violations: 18 U.S.C. 1952; 22 D.C. Code 1501, 1502, 1505; and with conspiracy to violate each of the above referred to statutes, 18 U.S.C. 371 (R. 12). Petitioners were found guilty, by a jury, of one (1) count, possession of number slips in violation of 22 D.C. Code Sec. 1502, a misdemeanor, and a mistrial as to the remaining counts was declared by the Court following a report by the jury that it was hopelessly deadlocked (R. ii). Retrial of the remaining counts of the indictment awaits the outcome of this petition for writ of certiorari.

Subsequent to indictment, petitioners moved to suppress the evidence seized in the raid, challenging the legal sufficiency of the affidavit which was the basis for the issuance of the search and arrest warrants and alleging that their rights under the Fourth Amendment to the Constitution of the United States had been violated (R. 13). The District Court denied the motion (R. 13). At trial, objections, on the same grounds, to the Government's proffer of evidence seized in the raid, were overruled, (Tr. 261, 322, 326, 340). Renewal of the motion to suppress, at trial and in post verdict motion was also denied (R. 16, Tr. 389, 554, 555). It cannot be doubted that all the evidence supporting defendants' convictions of possession of number slips consisted of the exhibits seized in the raid and testimony concerning the same.

The Search Warrant

Like Gaul, the six page affidavit, executed by ten special agents of the Federal Bureau of Investigation, may be divided into three parts. The major portion of the affidavit consists of observations of the four peti-

tioners by agents between August 7, 1962 and October 11, 1962, excluding the periods: August 10-19th; August 22- September 30th; and October 6-7th (R. 3-11). These observations consist of: seeing the petitioners, Skeens and Renner driving their automobiles in the State of Maryland; seeing the petitioner, Simpson, driving his automobile in the State of Virginia; observing Simpson, Skeens and Renner sitting at a table in the Hot Shoppe Restaurant around lunchtime; and viewing them entering and leaving premises 1452 Ogden Street, N. W., Washington, D. C. (R. 3-9).[3] All of this activity is remarkably similar to what thousands of people residing in suburban areas and working in Washington, D. C. do everyday. No improper activity of any description was observed.[4]

The second section of the affidavit comprises a recital of the petitioners' prior infractions of the law (R. 9-10). The third section is devoted to allegedly reliable information furnished by informants that defendants were engaged in the gambling business (R. 3), without however, any underlying circumstances as to credibility or reliability of either the information or the informants.

At Trial

During the execution of the search warrant, agents found a box containing slips of paper, one of which listed names and telephone numbers.[5] This was prof-

---

[3] Defendants, Simpson, Renner and Skeens were also seen in the vicinity of 6214 Third Street, N. W., Washington, D. C. (R. 3-5).

[4] At trial these agents admitted that these observations indicated no misconduct of any description (Tr. Vol. I, 97-99; 105, 106, 114-118; Vol. II, 126, 127, 144, 145, 186, 187, 210, 211, 221, 228, 232).

[5] Government Exhibit No. 20C (R. 50).

fered as the typical paraphernalia of a gambling establishment. There was no further testimony concerning the persons whose names appeared on the exhibit or their connection, if any, with the petitioners. Government counsel, in his vituperative closing argument to the jury, in an effort to explain why he had not called these persons listed on the exhibit, as witnesses, informed the jury that if the Government had gone to these people, they would say, "I am not saying anything, or I am taking the Fifth Amendment . . ." (R. 32). Objection was immediately made, but overruled by the Court without correcting the error or attempting to minimize or eliminate the prejudice resulting therefrom (R. 32, 33).

Subsequent to the verdict, petitioners moved for a new trial, setting forth these issues (R. 16, 17). The motion was denied (R. 17, 18). Although the issues raised before the Court of Appeals were substantial and not frivolous, the Court did not write an opinion, but affirmed the convictions by entry of a judgment (R. 3a).

REASONS FOR GRANTING THE WRIT

1. This cause presents two important aspects, of affidavits used to obtain search and arrest warrants, which are critical in the administration of criminal justice in federal courts.

As pointed out hereinbefore, the affidavit in the instant case, which was the sole basis for a Commissioner's issuance of arrest warrants and the authorization of a search of a private home, was devoted almost entirely to observations of completely innocent activity, which the agents themselves conceded was not improper or even suspicious. But the other two phases of the

affidavit raise important questions. Part of the affidavit in the instant case was devoted to a recitation of the criminal record of petitioners (R. 3-11). This recitation was irrelevant and immaterial to the current investigation, except as an instrument of prejudice or unless the old adage of "once a criminal, always a criminal" has become a legal maxim. When may, and when may not, a criminal record be relevant to the issue of probable cause? This Court has said that it may be relevant, *Brinegar* v. *United States,* 338 U.S. 160, 172-174, and also has emphatically stated that, of itself, it may not furnish probable cause, *Beck* v. *Ohio,* 379 U.S. 89, 97. A more definitive explanation is necessary. If in a particular case, a criminal record is not relevant to the issue of probable cause, is its inclusion in an affidavit, improper, and prejudicial, as possibly effecting the determination of the Commissioner on the issue of probable cause? The instant case included not only remote convictions but also arrest records.

It is respectfully submitted that affidavits which are the sole predicate for search warrants should not include arrest records, nor records of convictions that are not closely related in point of time, and have some relevancy to the place being searched. Perhaps a far better practice, which would insure a fairer determination of the issue of probable cause by a Commissioner or Magistrate would exclude criminal arrest and conviction records.

The second phase of this affidavit deals with conclusions of confidential, hearsay informants. This Court has clearly delineated the law on this point in *United States* v. *Ventresca,* 380 U.S. 102 (1965), *Aguilar* v. *Texas,* 378 U.S. 108, (1964) and *Jones* v.

United States, 362 U.S. 257, (1960). It would seem however, that there is difficulty in the application of these decisions. The instant affidavit fails to set forth any underlying circumstances from which the affiants could have concluded that the informants were credible, or that the informants information was reliable, or any of the underlying circumstances which formed the basis for the informants' conclusions. A comparison of the affidavits in *Jones,* supra, and *Ventresca,* supra, with the instant affidavit, demonstrates, clearly, the lack of underlying circumstances. None of the usual circumstances, such as overheard incriminating conversation, carrying of brown bags, carrying of gambling paraphernalia, exchanges of money, bulging pockets, or even the placing of a bet, is present in the instant case.

In view of the fact, that most affidavits which are the basis for search warrants, contain information supplied by confidential informants, a study of the application of the underlying circumstances rules to a situation such as the instant case, is warranted.

2. "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury by claiming the privilege.

* * *

"On the other hand the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. *Grunewald* v. *United States,* 353 U.S. 391, at 421, and 424 (1957).

In the light of these comments by this Court, it is strange that the Court of Appeals has permitted a

prosecutor to suggest to a jury in his closing argument, over objection, that had he called certain persons as witnesses, they would have taken the Fifth Amendment.[6] Certainly, of all people, a Government prosecutor, "... should be better advised ..." than to view this privilege as a shelter for wrongdoers. As was stated by this Court in *Grunewald,* supra, the danger was obvious that the jury in the instant case would believe that the persons whose names on the list (Government Exhibit 20 C)[7] had or would take the Fifth Amendment plea of self-incrimination in answer to any relevant questions posed by Government counsel, and that therefore they must have been involved in a gambling violation. Since they were so involved, the petitioners possession of a list of their names was incriminating. Such a practice, by a Government prosecutor, should be condemned.

---

[6] The Government prosecutor in reply to the defense argument that the Federal Bureau of Investigation for all of its investigating in the case, did not bring before the jury those persons listed on Government Exhibit 20C, which the Government contends is the type of document kept by gamblers, said:

> Why weren't they here on the stand? Well, they gave their own answer. That wasn't found, that list wasn't found until the day that the FBI agents made the arrest. If you went to those people now—there aren't enough wire taps around to prove what went on between those phones—if they say: I am not saying anything, or I am taking the Fifth Amendment, what can you do? (R. 32).

[7] R. 50.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. CAREY
WALTER E. GILLCRIST
Counsel for Petitioners
821 Fifteenth Street, N. W.
Washington, D. C., 20005

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTES

Federal Rules of Criminal Procedure, Rule 4(a)

Rule 4. Warrant or Summons upon Complaint

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

Federal Rules of Criminal Procedure, Rule 41(c) and (e)

Rule 41. Search and Seizure

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place

to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

The Act of March 3, 1901, c. 854, § 863a as added by Act of April 5, 1938, 52 Stat. 198, c. 72 § 2, and amended

No. 19,198

John C. Renner, *Appellant,*

v.

United States of America, *Appellee.*

No. 19,199

Fedora A. Flanagan, *Appellant,*

v.

United States of America, *Appellee.*

Appeals from the United States District Court for the District of Columbia.

Before: Washington, Wright and McGowan, Circuit Judges.

Judgment

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof it is ORDERED AND ADJUDGED by this court that the judgments of the District Court appealed from in these cases be, and they are hereby, affirmed.

PER CURIAM

Dated: September 21, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 810

FRANCIS A. SIMPSON, JR., JAMES T. SKEENS, JOHN C. RENNER, AND FEDORA A. FLANAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals issued no opinion.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1965 (R. 51; Pet. App. 3a–4a), and a petition for rehearing *en banc* was denied on November 9, 1965 (R. 52–61). The petition for a writ of certiorari was filed on December 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

798-729—66

QUESTIONS PRESENTED

1. Whether, in a prosecution for illegal possession of numbers slips, there was probable cause for the issuance of arrest and search warrants.

2. Whether it was proper to permit government counsel to answer the comments of petitioner's counsel, in his closing argument, on the government's failure to produce witnesses whose names and telephone numbers appeared on a list seized in execution of a search warrant.

STATEMENT

Petitioners were charged in the United States District Court for the District of Columbia with gambling offenses, in violation of 18 U.S.C. 1952 and 22 D.C. Code 1501, 1502, 1505, and conspiracy (R. 12). They were found guilty by the jury only on Count 4 (possession of numbers slips in violation of 22 D.C. Code 1502) (R. 48–49); a mistrial was declared on the remaining counts after the jury announced that it was hopelessly deadlocked (R. 47). Petitioners Simpson, Skeens and Renner were sentenced to imprisonment for one year, and petitioner Flanagan was placed on probation for two years (R. 18–19). On appeal, the convictions were affirmed (R. 19–20, 51; Pet. App. 3a–4a).

1. On October 12, 1962, ten F.B.I. agents signed an affidavit in support of an arrest warrant for petitioners Simpson, Skeens, and Flanagan and a search warrant for premises located at 1452 Ogden Street, N.W., Washington, D.C. (R. 3–11). The affidavit stated that information had been received from

sources proved to be reliable on numerous past occasions that Simpson was conducting a numbers and gambling operation at this address (R. 3). In support, the affidavit stated that confidential informants had furnished information that Simpson and his associates frequently moved to avoid detection, that they had been known to operate at 6214 Third Street, N.W., and that Skeens and Flanagan had been employed with Simpson in his numbers operations at one or both of the two addresses (R. 3). The affidavit recited various occasions between August 6, 1962, and October 11, 1962, when agents had seen Skeens and Renner driving their automobiles in Maryland; Simpson driving his automobile from Virginia to Washington, D.C.; Simpson, Skeens and Renner near the premises at 6214 Third Street, N.W.; Simpson, Renner and Skeens having lunch at a Georgia Avenue Hot Shoppe; and Simpson, Skeens, Renner and Flanagan entering and leaving the premises at 1452 Ogden Street, N.W. (R. 3-9). The affidavit further stated that it was known that Simpson had been arrested for lottery and horse bets by the Arlington, Virginia, police in 1955; that Skeens had been arrested in an investigation of possession of gambling equipment in 1957; that Skeens had been convicted in 1949 of assault with a deadly weapon arising out of a dispute over the collection of a gambling debt; that Fedora Flanagan had been arrested on January 21, 1961, by Arlington, Virginia, police for violation of the lottery laws; that Renner had been arrested on May 30, 1962, for tampering with a slot machine; and that one Sikes advised that

on June 15, 1962, in Washington, D.C., he had been beaten up by Skeens, Renner, and others for what Skeens considered "welching" on a baseball bet (R. 9–10).

The arrest and search warrants were issued on October 12, 1962, and executed on October 15 at 6:15 p.m. (R. 1–2). A pre-trial motion to suppress the evidence seized was denied (R. 13). The numbers slips and various gambling paraphernalia seized in the raid were admitted in evidence at the trial over petitioners' objections.

2. One of the items taken in execution of the search warrant was Gov. Exhibit No. 20–C, which contained a list of names and telephone numbers found in the bottom of a shoe box (R. 50). In referring to this exhibit in closing argument, petitioners' counsel, after reading some names and telephone numbers, stated (R. 31):

> Well, you have, I would estimate, probably twenty-five to thirty names on that card and you know as well as I, the FBI, I am sure, has talked to everybody named or everyone listed on that card and if they could establish that any of these names were used as gamblers or had bet with these people, this courtroom wouldn't be big enough, we'd have to open all the doors to let a third of them in at one time.
>
> Here you have all these names, every one of them, and their telephone numbers listed, and an amateur sleuth such as you and I could run that down, and they don't have any of these people here at all.

In reply, government counsel, after pointing out that petitioners' counsel had omitted to read the code

ARGUMENT

1. There was ample evidence of probable cause before the commissioner to justify the issuance of search and arrest warrants. See *United States* v. *Ventresca,* 380 U.S. 103; *Rugendorf* v. *United States,* 376 U.S. 528; *Jones* v. *United States,* 362 U.S. 257. The affidavit recited information given to affiants by informants who had proved reliable on numerous past occasions and set forth in detail the agents' observations confirming the reliability of the information. As the affidavit showed, the agents had observed Simpson and Skeens on several occasions at the first address given by the informants, and more than a month later had seen all three at the second address on nine consecutive weekdays. This tended to verify the informants' information. Additional verification lay in the time of day petitioners entered and left their headquarters on these weekdays—between 11:00 a.m. and noon, and after 6:00 p.m. (R. 6–9). These would be the expected working hours of a numbers operation based on pari-mutuel totals at a race track. And the police records showing petitioners' history of involvement in illegal gambling activities were relevant, albeit not alone sufficient, on the issue of probable cause. *Brinegar* v. *United States,* 338 U.S. 160, 172–174.

2. In closing argument, petitioners' counsel stated that he and the jury knew that the F.B.I. had spoken to the 25 to 30 persons listed on Gov. Ex. 20–C and would have brought them in as witnesses if the government had been able to establish that any of them had placed bets with petitioners (R. 31). In this

context, the court properly permitted government counsel to suggest in reply that if called as witnesses these persons might have refused to testify on Fifth Amendment grounds. For government counsel may, in closing argument, make responses to defense arguments which might be inappropriate if defense counsel had not first raised the subject. *Lawn* v. *United States,* 355 U.S. 339, 359–360, n. 15; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 241, 242; *Homan* v. *United States,* 279 F. 2d 767, 775–776 (C.A. 8), certiorari denied, 364 U.S. 866; *Gridley* v. *United States,* 44 F. 2d 716, 739 (C.A. 6), certiorari denied, 283 U.S. 827.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JANUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966